STATE OF TENNESSEE V. KEVIN PATTERSON*

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In July 2015, a jury found defendant John O'Keefe Varner guilty of attempted second-degree murder, aggravated assault, and felon in possession of a firearm. At the sentencing hearing in September 2015, the trial court sentenced Defendant to life in prison without the possibility of parole. The sole issue before the Tennessee Supreme Court was whether the State provided sufficient notice under the "three strikes law" that it intended to seek a sentence of life without parole.[1]

The Defendant met the victims in early February 2013. The victims, Brandi Frazier and Scott Wilfong, had intervened after Defendant dragged his girlfriend from a vehicle by her hair and hit her. When Defendant turned on Ms. Frazier, Ms. Frazier struck him on the head with a bottle. Defendant and the two victims briefly argued before their exchange was over.

Not long after this first interaction, on February 9, 2013, the victims were meeting at an acquaintance's house. Defendant arrived and insisted that he and Mr. Wilfong had "unfinished business." Believing Defendant intended to fight, Mr. Wilfong went outside to confront him. Defendant had a gun and shot Mr. Wilfong in the hip. Mr. Wilfong escaped before Defendant could shoot him again.

At the sound of the gunshot, Ms. Frazier ran outside. Defendant aimed his gun at Ms. Frazier, but instead of shooting her, he hit her in the face. Defendant ran to his truck, got in, and drove away. He fled to Las Vegas after the shooting and was not arrested until a year and a half later.

After Defendant was arrested, on January 1, 2015, the State filed a document with the title: "Notice of Prior Convictions," which gave Defendant notice of the convictions that it planned to use "to impeach the defendant's testimony, and/or to enhance the defendant's punishment." The notice continued: "The State of Tennessee also hereby gives notice to the defendant of its intent to seek to have him declared as a Repeat Violent Offender pursuant to T.C.A. § 40-35-120." It then listed a number of Defendant's convictions dating back to 1985.

At trial in July 2015, the parties stipulated that Defendant had been convicted of a felony prior to February 2013, and that this conviction prohibited him from possessing a firearm. Defendant was convicted of attempted second-degree murder, aggravated assault, and being a felon in possession of a firearm.

The trial court conducted a sentencing hearing on September 23, 2015, at which the prosecution entered certified copies of judgments showing Defendant's convictions of

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* *State v. Patterson*, 538 S.W.3d 431 (Tenn. 2017).

[1] A related issue in the appeal was whether the Defendant had established that any deficiencies in the State's notice adversely affected his substantial rights, as required under the plain error doctrine. The Court summarily dismissed this issue in a single paragraph at the conclusion of its opinion, noting that the Defendant had not even attempted to establish prejudice.

second-degree murder in 1994 and facilitation of second-degree murder in 1992. The trial court confirmed with defense counsel that the defense had no objection concerning the accuracy of Defendant's prior criminal record. The trial court then ruled that it had "no choice" but to sentence Defendant to life in prison without the possibility of parole under the three strikes law set forth in Tenn. Code Ann. § 40-35-120.

Defendant appealed (without challenging his sentences), and the Court of Criminal Appeals affirmed the convictions. However, two judges of the Court of Criminal Appeals *sua sponte* found that the State's notice of intent to sentence Defendant as a Repeat Violent Offender was inadequate because it (a) failed to sufficiently describe the nature of Defendant's prior qualifying convictions, and (b) failed to list the dates of the separate periods of incarceration. As a result, the Court of Criminal Appeals found that "the document filed by the State did not qualify as notice pursuant to the repeat violent offender statute." The Court of Criminal Appeals set aside the sentence of life in prison without possibility of parole and remanded for resentencing.

The Supreme Court explained that Tennessee's criminal statutes provide for enhanced sentences when a defendant is a "multiple, persistent, career [or] repeat violent offender[]." When seeking to enhance a defendant's sentence due to any of these classifications, the State must provide notice of its intent to do so. As the language of the statutory notice requirement for a "Repeat Violent Offender" (the classification applied to Defendant) is similar to the language for these other classifications, the Court looked to cases interpreting the notice requirement for the other classifications.

Quoting its 1990 opinion in *State v. Adams*, 788 S.W.2d 557, the Court explained that the purpose of the statutory notice requirement for multiple, persistent, or career offenders is to "provide[] defendants with fair notice of their exposure to enhanced sentencing, order[] plea-bargaining, enable[] defendants to make informed decisions before pleading guilty, aid[] defendants in developing trial strategy and preparing for sentencing hearings, and assist[] defendants in evaluating the risks and charting a course of action before trial." In evaluating statutory notices, the Court has recognized that embedding information inside an unrelated document is problematic and has instructed that the preferred method is to file separate documents with proper captions.

When interpreting the statutory notice requirement for multiple, persistent, or career offenders, the Court has not required strict compliance. However, the Court has held that when a notice fails to provide *any* of the statutorily required relevant information, the notice is ineffective and cannot support imposition of an enhanced sentence. The State must substantially comply with the notice requirement, and then if there is ambiguity in the notice, the burden shifts to the defendant to seek additional information. The Court has declared that "fair notice" is required, not "perfect notice."

Turning to the statutory language for the Repeat Violent Offender notice requirement, the Court explained that the State is required to "file a statement with the court … [that] shall set forth the dates of the prior periods of incarceration, as well as the nature of the prior conviction offenses." Failure to provide any notice at all precludes the State from seeking enhanced sentencing as a Repeat Violent Offender.[2]

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[2] *See* State v. Cooper, 324 S.W.3d 501 (Tenn. 2010).

The Court applied the principles it found in the cases interpreting the sufficiency of State notice for multiple, persistent, or career offenders. The Court concluded that under the Repeat Violent Offender statute, the State must provide at least *some* notice of intent to seek enhanced sentencing prior to trial. The "better practice" is to provide notice by a separate, properly captioned document and not to include the notice in a document addressing several subjects. However, since the statute does not prescribe a particular form, the Court declined to mandate one.

The Court stated: "The form of the notice alone will almost never be a sufficient basis for precluding the State from seeking enhanced sentencing." The notice need not be perfect, but it must be fair. If the notice substantially complies with the statute but leaves some question, "an accused has a duty to inquire about an ambiguous or incomplete notice and must show prejudice to obtain relief."

The Court declined to adopt Defendant's argument that the State must strictly comply with the statutory notice requirement. It found that the State had timely provided Defendant of notice of its intent to seek enhanced sentencing as a Repeat Violent Offender. Although the notice contained errors (and even omissions), the Court concluded that the State's notice, "albeit imperfect, was sufficient to trigger the defendant's duty to inquire into the omitted and incorrect information." Defendant failed to make any such inquiry. Therefore, the Court reversed the decision of the Court of Criminal Appeals and reinstated the Repeat Violent Offender enhanced sentence.

The Court's decision in *Patterson* clarifies both the State's and the defendant's duties under the Repeat Violent Offender statute. The Court expressly stated that it did not endorse the State's failure to comply strictly with the notice requirement. At the same time, the Court found that the State's notice was sufficient to trigger Defendant's duty to inquire into the errors and omissions.

While it is valuable to have this clarification, the Court's conclusion is not surprising. As described above, the Court in *Patterson* followed decisions by Tennessee's appellate courts regarding the notice requirements of enhancement statutes. Additionally, other aspects of the Repeat Violent Offender statute suggest that the Legislature did not intend that the State's notice obligations be strictly construed. For example, if the State's notice is untimely, the statute provides that a defendant shall be granted a continuance, rather than dismissal of the Repeat Violent Offender enhancement.[3] And the Legislature has stated more than once that one of the principles and purposes in sentencing under Title 40, Chapter 35, is to protect society and prevent crime by "restraining defendants with a lengthy history of criminal conduct."[4] Furthermore, the liberal construction of the State's

[3] *See* TENN. CODE ANN. § 40-35-120(i)(2).
[4] *See* §§ 40-35-102 to -103.

obligations under Tenn. Code Ann. § 40-35-120(i) is consistent with other states' interpretations of their own "three strikes laws."[5]

The "three strikes laws" operate to lengthen sentences for recidivist defendants—those who have already demonstrated that a standard period of incarceration is ineffective for their rehabilitation. In *Patterson*, the Supreme Court joined many courts around the country that have concluded that as long as a defendant is provided "fair notice" that he is facing a possible enhanced sentence, the purpose of the notice requirement in these statutes is met. Thanks to *Patterson*, we know that a defendant can expect only "fair notice," not "perfect notice," under the Repeat Violent Offender statute.

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[5] *See, e.g.,* People v. Strock, 252 P.3d 1148 (Colo. Ct. App. 2010) (noting that Colorado has followed the "modern trend" of testing the sufficiency of an information—including a charge demanding enhanced sentencing as a Habitual Criminal—based on the fundamental objectives of the information rather than technical pleading requirements); Anderson v. State, 901 So.2d 213 (Fla. Ct. App. Dist. 4 2005) (concluding that a "general" notice of the state's intent to seek sentencing as a habitual offender was sufficient); Thomas v. State, 752 S.E.2d 67 (Ga. Ct. App. 2013) (noting that the Court places substance over form, and that oral notice of intent to seek habitual offender status, even if during plea negotiations, is sufficient); People v. Head, No. 334255, 2018 WL 1512557 (Mich. Ct. App. Mar. 27, 2018) (finding that a prosecutor's failure to file a notice under the Habitual Offender statute was harmless error where the defendant had actual notice through references in the information).